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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN JOSE

13 IN RE: HIGH-TECH EMPLOYEE
14 ANTITRUST LITIGATION

15 THIS DOCUMENT RELATES TO:
16 ALL ACTIONS

Case No. 5:11-cv-2509-LHK

**DEFENDANTS' JOINT RESPONSE TO
PLAINTIFFS' ADMINISTRATIVE
MOTION TO FILE UNDER SEAL
FILINGS RELATED TO PLAINTIFFS'
OPPOSITION BRIEFS AND FILINGS RE
DKTS. 554, 556, 557, 559, 560, 561, 564, 570**

Pursuant to Local Rule 7-11 and 79-5, defendants Adobe Systems, Inc., Apple Inc., Google Inc., Intel Corporation, Intuit Inc., Lucasfilm Ltd., and Pixar (collectively, “Defendants”) hereby jointly respond to Plaintiffs’ Administrative Motion to File Under Seal Filings Related to Plaintiffs’ Opposition Briefs and Filings re Dkts. 554, 556, 557, 559, 560, 561, 564, 570 [Dkt. 608]. Defendants hereby jointly move to seal redacted portions of the following:

(i) Plaintiffs’ Consolidated Opposition to Defendants’ Joint and Individual Motions for Summary Judgment (“Plaintiffs’ Opposition”);

(ii) Exhibits to the Declaration of Lisa J. Cisneros in Support of Plaintiffs’ Opposition Briefs re Dkts. 554, 556, 557, 559, 560, 561, 564, 570 (“Cisneros Decl.”);

(iii) Exhibits to the Declaration of Dean M. Harvey in Support of Plaintiffs’ Opposition Briefs re Dkts. 554, 556, 557, 559, 560, 561, 564, 570 (“Harvey Decl.”).

The redacted information has been designated Confidential or Attorneys’ Eyes Only under the Stipulated Protective Order (Modified by the Court) (Dkt. No. 107). Defendants are concurrently filing declarations in support of the respective sealing requests and are concurrently filing a proposed order listing each document sought to be redacted and the specific support for each request.

I. LEGAL STANDARD

Rule 26(c) of the Federal Rules of Civil Procedure provides broad discretion for a trial court to permit sealing of documents for, inter alia, the protection of “a trade secret or other confidential research, development, or commercial information.” Fed. R. Civ. P. 26(c)(1)(G).

Where the documents are submitted in connection with a dispositive motion, the Ninth Circuit has ruled that documents should be sealed when “compelling reasons” exist for protecting information from public disclosure. *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir. 2006). Courts have found that “[o]ne factor that weighs in favor of sealing documents [under the compelling reasons standard] is when the release of the document will cause competitive harm to a business.” *Apple v. Samsung*, 727 F.3d 1214, 1221-22 (Fed. Cir. 2013); *Apple Inc. v. PsystarCorp.*, 658 F.3d 1150, 1162 (9th Cir. 2011) (“The publication of materials that could result in infringement upon trade secrets has long been considered a factor

1 that would overcome this strong presumption.”); *see also Nixon v. Warner Commc’n, Inc.*, 435
 2 U.S. 589, 598 (1978) (“common-law right of inspection has bowed before the power of a court to
 3 insure that its records” are not used as “sources of business information that might harm a
 4 litigant’s competitive standing”). Moreover, the release of trade secrets constitutes “compelling
 5 reasons” sufficient to outweigh the public’s interest in disclosure. *Samsung*, 727 F.3d at 1221-22.

6 **II. COMPELLING REASONS EXIST TO SEAL CONFIDENTIAL INFORMATION
 7 SUBMITTED IN CONNECTION WITH PLAINTIFFS’ OPPOSITION PAPERS.**

8 The redacted portions of Plaintiffs’ MSJ Opposition and the exhibits filed in support of
 9 Plaintiffs’ MSJ Opposition, Plaintiffs’ Memorandum of Law in Opposition to Defendants’ Joint
 10 Motion to Exclude the Expert Testimony of Matthew Marx, Ph.D. [Dkt. 602], Plaintiffs’
 11 Opposition to Defendants’ Motion to Exclude Testimony of Edward E. Leamer, Ph.D. [Dkt. 604]
 12 and Opposition to Motion to Strike Reply Report of Edward Leamer, Ph.D. [Dkt. 600] (all
 13 attached to the Cisneros Decl. and Harvey Decl.) contain highly confidential and commercially
 14 sensitive information about employee compensation, including Defendants’ compensation data as
 15 well as information that reflects Defendants’ internal business strategies related to compensation
 16 and internal assessments of their and other employers’ competitive position in the labor market.
 17 Defendants also seek to keep under seal materials that reflect confidential hiring data, which
 18 reveal confidential recruiting and hiring strategies, practices, and policies. Defendants further
 19 seek to keep under seal information in business contracts which reflect internal business
 20 strategies, policies, and practices. Finally, defendants seek to keep under seal the personal
 21 identifying or private information of employees and third parties. Defendants designated the
 22 foregoing information “Confidential” or “Attorneys Eyes Only” under the Protective Order.

23 As the concurrently filed declarations demonstrate, Defendants keep the sealed
 24 information confidential and the public disclosure of certain information would cause each
 25 Defendant harm by giving third-parties (including individuals responsible for competitive
 26 decision-making) insights into confidential and sensitive aspects of each of the Defendants’
 27 strategies, competitive positions, and business operations, allowing these third-parties to
 28 potentially gain an unfair advantage in dealings with and against each of the Defendants.

1 This type of information is regularly sealed because disclosure could cause competitive
 2 harm. *See, e.g., Rich v. Shrader*, No. 09CV652, WL 6028305, at *3-4 (S.D. Cal. Nov. 13, 2013)
 3 (granting motion to seal deposition testimony attached to summary judgment motion that contains
 4 “information on Booz Allen compensation policies” and “internal policies and controls with
 5 regards to employee performance and review”); *Krieger v. Atheros Commc’ns, Inc.*, No. 11-CV-
 6 00640, 2011 U.S. Dist. LEXIS 68033 at *3-4 (N.D. Cal. June 25, 2011) (sealing “sensitive and
 7 confidential information, including long-term financial projections, discussions of business
 8 strategy, and competitive analyses” under the compelling reasons standard); *EEOC v. Kokh, LLC*,
 9 No. CIV-07-1043, 2010 U.S. Dist. LEXIS 82526, at n.1, 2010 BL 187807 (W.D. Okla. Aug. 09,
 10 2012) (sealing summary judgment materials that discuss “confidential salary information”);
 11 *Network Appliance, Inc. v. Sun Microsystems Inc.*, No. C-07-06053, 2010 U.S. Dist. LEXIS
 12 21721, at *9 (N.D. Cal. Mar. 10, 2010) (sealing “internal information regarding [defendant’s]
 13 business strategies and opportunities that were not widely distributed”); *see also TriQuint
 14 Semiconductor, Inc. v. Avago Techns. Ltd.*, No. CV 09-531, 2011 U.S. Dist. LEXIS 143942, at *9
 15 (D. Ariz. Dec. 13, 2011) (granting motion to seal “market analysis information,” under
 16 compelling reasons standard, including business strategy documents, such as information relating
 17 to “product competitiveness, and market and technological opportunities and risks”).

18 Moreover, the redacted information constitutes trade secrets, defined as “any formula,
 19 pattern, device or compilation of information which is used in one’s business, and which gives
 20 him an opportunity to obtain an advantage over competitors who do not know or use it.”
 21 *Samsung*, 727 F.3d at 1221-22. As evidenced by the concurrently filed declarations, the
 22 information Defendants seek to seal relate to Defendants’ internal business practices and
 23 strategies used in compensating, recruiting, and hiring employees, as well as the confidential
 24 terms of business agreements. This falls plainly within the trade secrets definition. *Id.*; *see also*
 25 *In re Electronic Arts, Inc.*, 298 F. App’x. 568, 569-70 (9th Cir. 2008).

26 Further, specific employee salary information is regularly sealed because of its
 27 confidential and private nature. *See Renfro v. Unum*, No. 09-2661, 2010 BL 104197 (N.D. Cal.
 28 May 10, 2010) (granting a motion to seal records containing plaintiffs’ salary information);

1 *Nettles v. Farmers Ins. Exch.*, No. C06-5164, 2007 WL 858060, at *2 (W.D. Wash. Mar. 16,
 2 2007) (holding that salary review notices for third parties “who have not chosen to have their
 3 salary history placed into the public record” could be sealed.); *EEOC v. Kokh, LLC*, No. CIV-07-
 4 1043, 2010 WL 3155900, at *1 n.1 (W.D. Okla. Aug. 09, 2010) (noting that portions of summary
 5 judgment materials were filed under seal because they contained “confidential salary
 6 information”). In addition, personal identifying information of third-party employees should be
 7 sealed because they have not sought to make their identities known or placed in the public record.
 8 *Nettles* at *2 (holding that the interests of private parties outweighed the public’s right of access
 9 with respect to information pertaining to third party salary and employment separation
 10 information).

11 **III. CONCLUSION**

12 For the foregoing reasons, Defendants respectfully request that this Court order the above-
 13 referenced materials be placed under seal.

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15 Dated: February 21, 2014

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